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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 162

THE UNITED STATES OF AMERICA ex Rel. ASPASIA POLYMERIS and ANTIGONE POLYMERIS, Petitioners,

vs.

JOSEPH W. TRUDELL, Immigration Inspector in Charge.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HAROLD VAN RIPER,
Counsel for Petitioners.

(35,916)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 162

UNITED STATES OF AMERICA ex REL. ASPASIA POLYMERIS AND ANTIGONE POLYMERIS, PETITIONERS,

vs.

JOSEPH W. TRUDELL, IMMIGRATION INSPECTOR IN CHARGE, RESPONDENT,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners, by their attorney, Harold Van Riper, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case May 11, 1931.

Questions Presented.

1. Whether, in view of the provisions of Sec. 13 (*b*) of the Immigration Act of 1924 (8 U. S. C. 213), aliens previously, lawfully admitted into the United States for permanent residence therein, who have established a domicile therein, and whose status conforms in every particular with Sec. 4 (*h*) of said Act (8 U. S. C. 204), lawfully can be excluded by the Secretary of Labor from re-entering the United States and resuming their residence in their lawful places of domicile after a temporary visit abroad merely because at the time of seeking entry at a United States border port, they were not possessed of either a re-entry permit secured prior to departure under Sec. 10 of the Immigration Act of 1924 (8 U. S. C. 210) or the unexpired immigation visa mentioned in Sec. 13 (*a*) of said Act (8 U. S. C. 213).

2. Whether the Secretary of Labor can render null, void and inoperative a section of law, namely, Sec. 13 (*b*) of the Immigration Act of 1924 (8 U. S. C. 213-*b*) merely by ignoring same.

3. Whether or not under the Constitution of the United States a lawfully domiciled alien has the right to occupy, depart from and return to his domicile without let or hindrance.

Statement.

The petitioners, mother and daughter, entered the United States and were lawfully admitted for permanent residence in 1909, were abroad temporarily for

less than a year in 1913, and in 1923 again went abroad intending to remain less than six months, but were delayed in their return to their domicile in the United States by circumstances over which they had little or no control, and which we claim did not constitute a relinquishment of domicile, until they presented themselves for readmission at St. Albans, Vermont, on August 2, 1930.

A Board of Special Inquiry at St. Albans, Vermont, excluded them as being quota immigants not in possession of valid quota consular immigration visas (R. 84) and they appealed to the Secretary of Labor at Washington.

On August 12, 1930, the Secretary of Labor's Board of Appeal and Review prepared a long memorandum and upon the basis thereof the Secretary of Labor affirmed the excluding order of the Board of Special Inquiry. Said memorandum and order are not printed in the record on appeal herein and, therefore, are appended *in toto* to the brief herewith submitted in support hereof.

Thereafter a writ of *habeas corpus* was sued out, it was sustained on August 22, 1930, by Hon. Harland B. Howe, U. S. District Judge, with an opinion (R. 116) in which he said:

> "The evidence that their domiciles were and are here is emphatic—there is none to the contrary. In 1923 they went to Greece, intending to return within six months, but the illness and death of the husband of Aspasia—the father of Antigone—and the settlement of his sizable estate caused them to remain in Greece *longer*

than they had originally intended. *After this their return was delayed for a long time by the refusal of the Consul to give them visas.*" (Italics ours.)

On May 11, 1931, the United States Circuit Court of Appeals for the Second Circuit reversed the order of the United States District Court with an opinion in which it said:

> "We think the relators have brought themselves well within the claimed status as immigrants once lawfully admitted who were returning from a temporary visit abroad. They always intended to come back as soon as they could. That depended upon the condition of health of Aspasia's husband and after he died upon the time required for them to remain to attend to the settlement of his estate. Surely this was all a matter of time which might be relatively short and with proof of an unrelinquished United States domicile of seven consecutive years satisfactory to the Secretary of Labor, gave him power to admit them in his discretion under 8 U. S. C. A., Sec. 136 (*p*). See Immigration Rules of January 1, 1930, Rule 13 (A). However, he has not admitted them and the issue now is whether they could enter of right with no return permits and no immigration visas.
>
> Although we have great respect for the court which rendered the decision in Johnson *v.* Keating, *supra,* we cannot agree with that decision. Sec. 13 (*a*) of the Immigration Act of 1924, so far as pertinent to the present case, denies an immigrant admission to the United States unless he has an unexpired immigration visa.

Subdivision (*b*) of the same section is as follows:

'(*b*) In such classes of cases and under such conditions as may be under regulations prescribed, immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.'

The 1930 regulations prescribed and applicable provide:

'Par. 2. An alien claiming to be a non-quota immigrant on the ground that he had been previously lawfully admitted to the United States abroad shall not be admitted as such unless at the time of arrival he shall establish that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad, presents an unexpired valid immigration visa duly issued by an American consular officer designating the holder as such: Provided, that the presentation of an unexpired valid permit to re-enter, duly issued to the holder thereof pursuant to the provisions of Sec. 10 of the Immigration Act of 1924, shall be deemed to show *prima facie* that such holder is returning from a temporary visit abroad, and shall be accepted also in lieu of immigration visa.'

Thus it appears that regardless of other requirements a returning alien cannot enter unless he has either an immigration visa or a return permit. If he has one or the other he is not limited in the proof of his right to enter to the *prima facie* proof afforded by the visa or the

permit but possession of one or the other of those two documents is an absolute condition upon his admission. See United States *ex rel.* Timpano *v.* Day, 21 Fed. (2d) 852."

Specification of Errors to be Urged.

The errors which the petitioners urge as ground for the granting of the writ of certiorari and for reversal of the judgment of the Circuit Court of Appeals for the Second Circuit are:

1. The Circuit Court of Appeals erred in reversing the order of the Trial Court.

2. The Court erred in holding that petitioners were not entitled under Sec. 13 (*b*) of the Act of 1924 (8 U. S. C. 213-*b*) to enter the United States without a visa or a re-entry permit.

3. The Court erred in holding that the 7th Proviso of Sec. 3 of the Immigration Act of February 5, 1917 (8 U. S. C. 136 P), gives the Secretary of Labor the right to exclude a lawfully domiciled alien, who is not excludable under any other provision of said Sec. 3, from re-entering the United States after a temporary visit abroad.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals for the Second Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the First Circuit. In *Johnson* v. *Keating ex rel. Tarantino,* Dec. 31, 1926, 17 F. (2d) 50, which decision has been cited by the Second Circuit Court of Appeals itself as

good law as to immigrants of the returning resident class, as distinguished from non-immigrants, in the following cases:

Lesto v. *Day*, C. C. A. 2, Aug. 4, 1927, 21 F. (2d) 307 at 309;

London v. *Phelps*, C. C. A. 2, Nov. 1, 1927, 22 F. (2d) 288 at 290;

Graber v. *Karnuth*, C. C. A. 2, Jan. 7, 1929, 30 F. (2d) 242 at 243;

Natali v. *Day*, C. C. A. 2, Nov. 17, 1930, 45 F. (2d) 113-114;

by the Ninth Circuit Court of Appeals in

Kumanomido v. *Nagle*, 40 F. (2d) 42 at 44;

by U. S. District Courts in the following cases:

U. S. v. *One Airplane*, D. C. S. D. Cal., Dec. 23, 1927, 23 F. (2d) 500;

Von Steer v. *Day*, D. C. S. D. N. Y., July, 1928, unreported;

Serpico v. *Trudell*, D. C. Vt., Nov. 8, 1928, 46 F. (2d) 669;

Graber v. *Karnuth*, D. C. W. D. N. Y., Nov. 10, 1928, 29 F. (2d) 315;

and is taken issue with in only one case, other than the instant case, namely, Timpano *v.* Day, U. S. D. C., S. D. N. Y., Oct. 10, 1927, 21 F. (2d) 852.

The question involved in this case is one of Federal law, which has not been, but should be, settled by this Court.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the judgment of

the Circuit Court of Appeals for the Second Circuit should be granted.

ASPASIA POLYMERIS AND
ANTIGONE POLYMERIS,
By HAROLD VAN RIPER,
Attorney for Petitioners,
1 *Broadway, New York, N. Y.*

June 1, 1931.

UNITED STATES OF AMERICA,
State and Southern District of New York, ss:

Harold Van Riper, being duly sworn, says that he is a member of the bar of the Supreme Court of the United States, is the attorney for the petitioners herein, and is duly authorized by said petitioners to make and execute this petition on their behalf; that he has read the foregoing petition and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information, and belief. Deponent certifies that he has examined the foregoing petition and the record herein, and that in his opinion it is well founded, meritorious, and entitled to the favorable consideration of the Court.

HAROLD VAN RIPER.

Sworn to before me this 2nd day of June, 1931.
[SEAL.] EMANUEL WEITZER,
Notary Public.

N. Y. Co. Clerk No. 734, Reg. No. 2W466.
Kings Co. Clerk No. 242, Reg. No. 2288.
Term expires March 31, 1932.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court sustained the writ of *habeas corpus* with an opinion (R. 115). The Circuit Court of Appeals reversed the District Court with an opinion, which is unreported and is appended to the record (R. 127).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on May 11th, 1931 (R. 131).

The jurisdiction of this Court is conferred by Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes and Regulations Involved.

The applicable statutes and regulations are short and are quoted from time to time as references are made thereto.

Statement.

The petitioners are Aspasia and Antigone Polymeris, mother and daughter, respectively. At the time of their first arrival in the United States in 1909, the daughter was eight years of age and the mother forty-two (R. 19). They took up their residence in New

York City with their two sons and brothers, respectively. Aspasia first came here with her husband's permission (R. 78). In September, 1913, they left the United States temporarily for a visit to Greece and returned in October, 1914 (R. 25, 26 & 42). From 1909 until 1913, Antigone attended the public schools in New York City (R. 4, 31, 50 & 51). Afterward, she took a secretarial course and was employed from 1917 until 1923 as such in and about the city of New York (R. 52, 53 & 56). Aspasia has never had any employment in the United States. While here, her sons have always supported her (R. 40, 46 & 73). After their arrival in 1909, with the exception of a temporary visit to Aspasia's husband in 1913, they remained in New York until they went to Greece in August, 1923, on account of the illness of said husband of Aspasia.

The authorities do not question their lawful admission in 1909 and 1914, nor the fact that they maintained a residence here between 1909 and the time they left for Greece in 1923 (R. 9 & 10 and appendix hereto).

In departing from this country in 1923, the relatrixes claim that neither of them intended to abandon what they considered their home here, but that, in August, 1923, on account of the illness of Aspasia's husband, they went back to Greece to visit him.

Upon their departure, they filed an affidavit, stating their ages to be fifty-six and twenty-four years, respectively, that they had resided in the United States since 1916, that their present address was 46 West 66th Street, New York, N. Y., that they were temporarily leaving the United States from the port of New York on the S. S. President Wilson, sailing August 23, 1923,

for the purpose of visiting relatives temporarily, that they intended to return to the United States within six months to their son and brother, Constantine Polymeris, at 46 West 66th Street, an American citizen, engaged in the restaurant business at 242 West 145th Street, New York, and were in possession of a return, prepaid ticket (R. 111).

Aspasia's husband, Margariti, possessed quite an amount of property in and around Volo, which is about twenty hours' distant from Athens, Greece, consisting of orchards, vineyards, a tannery, and other real estate. A short time prior to their departure, Aspasia's husband was hit over the head by a robber and seriously injured.

Shortly after their arrival at Volo, Margariti became worse and finally died in February, 1924 (R. 37 & 67), and they remained in Greece for the sole purpose of selling the property and settling the estate. Until 1926, they lived in the town of Volo near which the property is situated and then moved to Athens (R. 75, 76, 80). They continued to live in Athens until the time of their departure for Canada in 1930.

It seems, however, that this property was rented out on a percentage, that the daughter did nothing while in Greece, that both received money from Aspasia's sons in New York City, and that they did not get any net results from the property (R. 75 & 76). The property was placed in the hands of a real estate agent to sell but that they could not dispose of it on account of insufficient price (R. 77). The value of the property is said to be from 800,000 to 900,000 drachmas.

The record shows that as early as January, 1924, five months after their departure from the United States, realizing that the serious illness of Mr. Polymeris would somewhat protract their stay abroad, Antigone wrote the American Consul at Athens asking what should be done to preserve their right to return to the United States (R. 27) and received his reply dated January 10, 1924 (R. 89). A month later the father died leaving a sizable estate requiring attention and Antigone again wrote the Consul and he replied to the effect that they would have to call personally at the consulate (R. 29). Finally in 1925, having arranged matters so that they could return to the United States, Antigone wrote the Consul asking for the issuance of a non-quota visa. He refused to issue same on the ground that they had been too long absent from the United States (R. 29), although at that time the absence had been only of about eighteen months' duration.

Immediately upon their arrival at Athens from Volo in 1926 they employed a lawyer named J. S. Tsatsonis to assist them in securing visas, but his efforts were without avail (R. 30).

Through the American citizen sons of Aspasia they retained New York counsel in 1928 (R. 30) after they had exhausted long and strenuous efforts in Greece. The only thing the Consul appears to have any record of is his letter to the aliens dated January 10, 1924, a copy of which was called to his attention and sent to him by the aliens' New York attorney with his letter dated February 22, 1929 (R. 92), which resulted in the appearance of the aliens at the consulate on March

13, 1929, and which was accompanied by the carefully prepared affidavits of Gus and Polimeros Polymeris, the two American citizen sons of Aspasia (R. 106-110), Aspasia and Antigone's Affidavit of Departure (R. 111), document showing extent of Aspasia's deceased husband's estate (R. 86-88), and said letter of American Consul dated January 10, 1924 (R. 89).

Under date of March 20, 1929, the American Consul General replied to said letter (R. 90).

Subsequently said attorney wrote the Secretary of State under date of July 22, 1929 (R. 94), the Secretary of State replied thereto under date of August 3, 1929 (R. 98), said attorney again wrote the Secretary of State under date of August 14, 1929 (R. 101) and the Secretary of State replied thereto under date of August 19, 1929 (R. 104).

Such efforts having proved unavailing, the aliens made their way to Montreal and from there journeyed to the Immigration Border Port of St. Albans, Vermont, on August 2, 1930, and went before a Board of Special Inquiry there for the purpose of asserting their right to re-enter the United States as returning residents under Sections 4-B and 13-B of the Immigration Act of 1924 (8 U. S. C. 204-213).

They were given hearings on August 2nd, 1930 (R. 24) and on August 6, 1930 (R. 50), were excluded as quota immigrants not in possession of valid quota consular immigration visas (R. 84), and appealed to the Secretary of Labor at Washington.

On August 12, 1930, the Secretary of Labor's Board of Appeal and Review prepared a long memorandum, and upon the basis thereof the Secretary of Labor af-

firmed the excluding order of the Board of Special Inquiry. Said memorandum and order are not printed in the record on appeal herein and therefore are appended hereto *in toto*.

Thereafter a writ of *habeas corpus* was sued out, it was sustained on August 22, 1930, by Honorable Harland B. Howe, U. S. District Judge, with an opinion (R. 115), and subsequently an appeal was taken to the Circuit Court of Appeals, Second Circuit.

ARGUMENT.

POINT I.

Relatrixes were domiciled residents of the United States and entitled to re-enter under Section 13(b) without non-quota immigration visas or re-entry permits.

In his said decision of August 12th (appended hereto) the Secretary gives his reasons therefor, wherefore this Honorable Court has the right to consider whether the same meet with the requirements of the Act. Gegiow *v.* Uhl, 239 U. S. 3-9, holds:

> "The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the Act. The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*."

In the case at bar the Secretary on the first page of his decision finds as a fact that both aliens were lawful

residents of the United States from 1909 to 1923, which makes unnecessary a consideration of their activities during said period, except the fact that after their absence in Greece for a year from 1913 to 1914 they returned to New York as their place of domicile, which makes it reasonable to believe that they would have done likewise early in 1924 had not the father died. This narrows the case down to the question as to whether or not since 1923 they have relinquished said residence and domicile, and as to whether or not they now are excludable because they were not in possession of unexpired immigration visas at the time of their arrival at St. Albans on August 2nd, 1930.

On page two he makes a finding to the effect that the aliens made no attempt to secure visas until March, 1929, which is directly contrary to the sworn testimony of both aliens, allegedly basing said finding upon the consular records, which admittedly were not before him, but in reality basing it upon the unsworn statement contained in the Consul's letter of March 20, 1929, to relators' attorney (R. 90), which at most says he has no record of their efforts to secure visas.

Also on page two, the Secretary himself narrows the case down to the two issues mentioned above.

On the third page he quotes paragraph two of subdivision I of Rule 3 of the Immigration Rules of January 1, 1930, and in the following paragraph attempts to show that unless the aliens fall within the provisions of said rule they must be excluded. This is an erroneous construction of the law.

On May 10, 1926, Judge Thacher, S. D. N. Y., in U. S. *ex rel.* Patti *v.* Curran, 22 F. (2d) 314, wherein

the aliens were absent for one year and twenty days, and arrived possessed of re-entry permits which had expired, said:

> "Such a result obviously exalts form above substance, and gives to regulations intended to effectuate the intention of the statute an effect which defeats its purpose. This seems clear from the general purpose of section 13, which deals, not with qualifications for admission, but with the requisite evidence of such qualifications. This being its purpose, the broadest discretion is granted to the Secretary to dispense with procedural form when substantive right cannot otherwise be served (section 13 [b] and [d])."

Thereafter, on December 31, 1926, affirming the Court below, the U. S. Circuit Court of Appeals, First Circuit, in Johnson *v.* Keating, 17 F. (2d) 50, wherein after an absence of nine months an alien resident arrived at Providence without either a re-entry permit or a non-quota visa, at page 51 said:

> "(1, 2) The narrow question is whether, without an immigration visa or a return permit, he is entitled to admission. His rights depend upon the proper interpretation of the applicable provisions of the Immigration Act, *supra*. It is a question of law, reviewable on *habeas corpus*. Gegiow *v.* Uhl, 239 U. S. 3, 36 S. Ct. 2, 60 L. Ed. 114. Concededly, he is a non-quota alien under section 4 (*b*) being Comp. St. § 4289-3/4 *b*. * * *
>
> (3) But we need not rest our decision on the inconsistency of the regulations. We go farther.

Congress never delegated to immigration officials authority to make a regulation which cuts down substantially the rights given by the act itself. It is probable, perhaps certain, that Congress could not delegate such substantive legislative power. See Field *v.* Clark, 143 U. S. 649, 694, 12 S. Ct. 495, 36 L. Ed. 294.

The language in section 13 (*b*), that such non-quota immigrant may be let in 'under such conditions as may be by regulations prescribed', does not give authority to prescribe regulations which do not operate 'for the enforcement of the provisions of this act' (section 24) but operate to enlarge the excluding features of the act. Without further elaboration, we regard it as inconceivable that, if Congress had intended to make the rights of such returning aliens entirely dependent upon possession of a return permit or an immigration visa, it would not have said so in unmistakable terms.

A non-quota immigrant like Tarantino is entitled to come in, if he establishes his statutory status by any reasonable method. Williamson *v.* United States, 207 U. S. 425, 461, 462, 28 S. Ct. 163, 52 L. Ed. 278. Otherwise put, *a regulation which undertakes to exclude all evidence of non-quota status, except a return permit or an immigration visa, is unreasonable, inconsistent with the general import of the act, and therefore void.*" (Italics ours.)

Thereafter on April 29, 1927, in what appears to be an effort to circumvent both of said decisions, the Secretary promulgated General Order No. 87 which now

appears as Par. 2, Sub. I, Rule 3, Rules of January 1, 1930, and reads as follows:

> "An alien claiming to be a non-quota immigrant on the ground that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad shall not be admitted as such unless at time of arrival he shall establish that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad, and presents an unexpired valid immigration visa duly issued by an American consular officer designating the holder as such: Provided, That the presentation of an unexpired valid permit to reenter, duly issued to the holder thereof pursuant to the provisions of section 10 of the immigration act of 1924, shall be deemed to show *prima facie* that such holder is returning from a temporary visit abroad, and shall be accepted also in lieu of immigration visa. * * *"

It is to be noted that the former Paragraphs 2 and 5, which Judge Anderson held to be "plain and reasonable regulations" and within the power of the Secretary to promulgate under the Act, have been eliminated, and that the only real difference between the new rule and the one quoted and referred to by Judge Anderson on page 52 as inconsistent and an improper exercise of authority, is that it requires the alien to present as the only substitute for a non-quota immigration visa, an *"unexpired valid permit to re-enter"* instead of merely a permit issued "in accordance with the provisions of section 10 of the Act," the Government's stumbling block in the Patti case, *supra.*

If Johnson *v.* Keating is sound, and we respectfully submit that it is, the new rule is unlawful because it attempts to render nugatory the express provisions, purpose and intent of section 13 (*b*) of the Act by ignoring same.

Johnson *v.* Keating has been cited by the Second Circuit Court of Appeals itself as good law as to immigrants of the returning resident class, as distinguished from non-immigrants, in the following cases:

Lesto *v.* Day, C. C. A. 2, Aug. 4, 1927, 21 F. (2d) 307 at 309;

London *v.* Phelps, C. C. A. 2, Nov. 1, 1927, 22 F. (2d) 288 at 290;

Graber *v.* Karnuth, C. C. A. 2, Jan. 7, 1929, 30 F. (2d) 242 at 243;

Natali *v.* Day, C. C. A. 2, Nov. 17, 1930, 45 F. (2d) 113-114;

by the Ninth Circuit Court of Appeals in

Kumanomido *v.* Nagle, 40 F. (2d) 42 at 44;

by U. S. District Courts in the following cases:

U. S. *v.* One Airplane, D. C. S. D. Cal., Dec. 23, 1927, 23 F. (2d) 500;

Von Steer *v.* Day, D. C. S. D. N. Y., July, 1928, unreported;

Serpico *v.* Trudell, D. C. Vt., Nov. 8, 1928, 46 F. (2d) 669;

Graber *v.* Karnuth, D. C. W. D. N. Y., Nov. 16, 1928, 29 F. (2d) 315;

and is taken issue with in only one case, namely Timpano *v.* Day, U. S. D. C., S. D. N. Y., Oct. 10, 1927, 21 F. (2d) 852, in which Judge Thacher said at page 854:

> "With great deference to the opinion of the Court in Johnson *v.* Keating, *supra,* I find myself unable to concur in the decision in that case, and cannot escape the conclusion that the Regulations here in question were authorized by section 13 (*b*) of the Act of 1924."

It is to be noted that the Timpano case has never been cited in any of the later decisions, and that while on appeal it was withdrawn at the suggestion of the Secretary and the relator was admitted.

On page 4 of his decision the Secretary cites first and foremost the Timpano case, then the Patti case, Johnson *v.* Keating and Serpico *v.* Trudell, all of which have been referred to herein. In the last named case Serpico was abroad studying for eleven years and was admitted without a visa or a re-entry permit after *habeas corpus* proceedings.

He then proceeds to discuss the absence as having been of seven years duration, but fails to consider that the aliens evidenced their intention to return within a short period by the affidavit executed before their departure, by their retention of their bank accounts, by their continuing intent to return to the domicile from which they had temporarily departed, the home of the sons, and by their constant efforts by correspondence, by attorneys and by personal application to secure non-quota visas. They never could have secured re-entry permits because they departed before the present act became effective.

He then cites Lesto *v.* Day, 21 F. (2d) 307, and quotes a portion of it, but fails to quote that portion which shows that Lesto came back to the United States as

a visitor before his attempted re-entry as a resident and secured a re-entry permit by fraud, and that the case throughout did not ring true. The Lesto case cites U. S. *ex rel.* Randazzo *v.* Tod, C. C. A. 2, 297 F. 214, and U. S. *ex rel.* Devenuto *v.* Curran, C. C. A. 2, 299 F. 206, both relating to illiterates, as limiting a temporary absence to six months. However, the first proviso of Section 3 of the Act of Feb. 5, 1917 (8 U. S. C. 136—"o") provides that aliens who have lawfully resided in the United States for five years are exempted from the illiteracy test if returning within six months from an absence abroad, and the seventh proviso of said section (8 U. S. C. 136—"p") permits the readmission of illiterate aliens to unrelinquished domiciles of seven years or more, irrespective of the length of their absences. Incidentally, Section 10 of the 1924 Act (8 U. S. C. 210), providing for the issuance of re-entry permits, calls for one year periods with extensions for additional periods of six months each. Said case finally says of "temporary visit":

> "Without attempting to complete definition of 'a temporary visit,' we may say that we think the *intention* of the departing immigrant must be to return within a period relatively short, fixed by some early event." (Italics ours.)

And in the case at bar we meet this condition in the execution of the affidavit of departure (R. 111) and subsequent events.

He next cites Thomas *v.* Day, 29 F. (2d) 485, C. C. A. 2, Dec. 3, 1928, but fails to quote the portion from which it plainly appears that the court felt that the

aliens had secured their visas by fraud, and had foreclosed themselves from claiming resident status by entering as visitors in 1928. In addition, their original stay, upon which they sought to predicate a claim of residence, was only of about seven months duration. It likewise cites the illiteracy case of Devenuto *v.* Curran and the Lesto case, *supra,* and another illiteracy case, McKusick *ex rel.* Pattavina *v.* Johnson, C. C. A. 1, Dec. 5, 1924, 3 F. (2d) 398. Said opinion states:

> "Under these facts, the appellants have not established a domicile within the United States for they had no true fixed and permanent home or principal establishment to which they had an intention of returning whenever absent. No person is without a domicile and he can have but one at a time. U. S. *ex rel.* De Venuto *v.* Curran, *supra.*"

In the case at bar the aliens certainly did establish their domicile in the United States in 1909, they returned to it in 1914 after a short absence, they intended to return to it when they left in 1923 and were delayed by circumstances over which they had little or no control.

The De Venuto case, *supra,* is interesting in that it contains a complete résumé of the law and decisions on domicile and residence.

In the case at bar the testimony shows that the wife and daughter established their domicile in the United States with the express consent and under the direction of the husband, and that, in fact, he intended to join them here, which intention was not carried out because of his death (R. 61).

Point II.

The decision below is without basis in law.

The relatrixes' departure from the United States took place prior to the Act of 1924, when there was no provision of law for the issuance or extension of "return permit," they had no "return permit" and they did not attempt to enter with a "return permit" or a non-quota visa but did, on the contrary, seek to enter at St. Albans, Vermont, without either of said documents under the express provisions of Section 13 (*b*) of the Act of 1924 (8 U. S. C. 213), a matter under the jurisdiction of the Labor Department and not of the State Department.

The Court below said:

> "We think the relators have brought themselves well within the claimed status as immigrants once lawfully admitted who were returning from a temporary visit abroad. They always intended to come back as soon as they could. That depended upon the condition of health of Aspasia's husband and after he died upon the time required for them to remain to attend to the settlement of his estate. Surely this was all a matter of time which might be relatively short and with proof of an unrelinquished United States domicile of seven consecutive years satisfactory to the Secretary of Labor, gave him power to admit them in his discretion under 8 U. S. C. A., Sec. 136 (*p*). See Immigration Rules of January 1, 1930, Rule 13 (A). However, he has not admitted them and

the issue now is whether they could enter of right with no return permits and no immigration visas.

Although we have great respect for the court which rendered the decision in Johnson *v.* Keating, *supra,* we cannot agree with that decision. Sec. 13 (*a*) of the Immigration Act of 1924, so far as pertinent to the present case, denies an immigrant admission to the United States unless he has an unexpired immigration visa.

Subdivision (*b*) of the same section is as follows:

'(*b*) In such classes of cases and under such conditions as may be under regulations prescribed, immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.'

The 1930 regulations prescribed and applicable provide:

'Par. 2. An alien claiming to be a non-quota immigrant on the ground that he had been previously lawfully admitted to the United States abroad shall not be admitted as such unless at the time of arrival he shall establish that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad, presents an unexpired valid immigration visa duly issued by an American consular officer designating the holder as such: Provided, that the presentation of an unexpired valid [illegible] mit to re-enter, duly issued to the holder th[illegible] pursuant to the provisions of Sec. 10 of the [illegible]

migration Act of 1924, shall be deemed to show *prima facie* that such holder is returning from a temporary visit abroad, and shall be accepted also in lieu of immigration visa.'

Thus it appears that regardless of other requirements a returning alien cannot enter unless he has either an immigration visa or a return permit. If he has one or the other he is not limited in the proof of his right to enter to the *prima facie* proof afforded by the visa or the permit but possession of one or the other of those two documents is an absolute condition upon his admission. See United States *ex rel.* Timpano *v.* Day, 21 Fed. (2d) 852.''

An examination of the whole of Sec. 3 of the Immigration Act of February 5, 1917 (8 U. S. C. 136), however, will show that it contains all of the grounds upon which aliens may be excluded from entry into the United States, that the 7th Proviso of said Section (8 U. S. C. 136-P) is designed merely to permit the Secretary of Labor to overlook the grounds for exclusion in the cases of aliens whose domicile has been of seven or more years' duration, and nothing in said section gives him the power to exclude a lawfully domiciled alien unless he is excludable for some one or more of the reasons set forth in said section.

In the case at bar, however, the Second Circuit Court of Appeals seems to hold that the Secretary of Labor can exclude from readmission any lawfully domiciled alien even though none of the reasons specified in said Section 3 exist in the particular case, which

holding, we respectfully submit, is without basis in law.

It is to be noted that paragraph 2 of Subdivision "I" of Rule 3 of the Immigration Rules of January 1, 1930, quoted above, provides for the readmission of lawfully domiciled aliens under Sec. 13-A of the Immigration Act of 1924 (8 U. S. C. 213-A) when possessed of an unexpired valid immigration visa, and, without a visa, only when in possession of an unexpired valid permit to reenter issued under Sec. 10 of said Act (8 U. S. C. 210). We respectfully submit that said Sec. 10 provides one separate and distinct means whereby a resident alien may depart from and return to the United States without a visa and is complete in itself. Section 13 (*a*) provides for the readmission of resident aliens possessed of unexpired immigration visas if they are "otherwise admissible under the immigration laws," *i. e.*, not excludable under Sec. 3 of the Act of 1917, and is also complete in itself. Sec. 13 (*b*) clearly provides for the admission of returning residents who for one reason or another possess neither a permit to reenter nor an immigration visa. It will be seen, therefore, that while in his regulation the Secretary has given effect to two of the provisions for the re-entry of resident aliens, he has nevertheless absolutely ignored the third provision, *i. e.*, that contained in Sec. 13 (*b*). Certainly if Congress intended the re-entry permit as the only substitute for an immigration visa, Sec. 10 being complete in itself, there would have been no need for the enactment of Sec. 13 (*b*).

The case of Timpano *vs.* Day cited by the Circuit Court is a District Court decision and while the case was on appeal to the Circuit Court, upon the suggestion of the Secretary of Labor, the appeal was withdrawn and the Secretary admitted the alien as a returning resident without an unexpired visa or re-entry permit.

The unsworn statement in the Consul's letter of March 20, 1929 (R. 90), to the effect that subsequent to his letter of January 10, 1924, there is no record of any efforts on the part of the aliens until March 13, 1929, was merely offered into evidence to show that we had continued our efforts. The mere fact that he claims to have no record is not evidence that they did not exert the efforts testified to, U. S. *ex rel.* Linklater *vs.* Commissioner, 36 F. (2d) 239; U. S. *ex rel.* Shore *vs.* Day, 36 F. (2d) 264; Brader *vs.* Zurbrick, 38 F. (2d) 472; and it scarcely is to be believed that these aliens through their brothers would have retained New York counsel in 1928 until after they had exhausted long and strenuous efforts in Greece.

POINT III.

Relatrixes had unrelinquished domiciles in the United States, they were exempted from the necessity of having non-quota visas or re-entry permits, there was no substantial evidence to sustain the findings of the immigration authorities, and the decision of the District Court should be affirmed.

HAROLD VAN RIPER,
Attorney for Relatrixes,
1 *Broadway, New York City.*

APPENDIX.

55733/673. Montreal. August 12, 1930.

In re ASPASIA POLYMERIS and ANTIGONE POLYMERIS (Daughter).

This record relates to a 26-year-old single female, and her 60-year-old mother, natives of Greece, of Greek race, who applied for admission at the port of St. Albans on August 2, 1930. The younger alien is literate, the mother is unable to read. Both have been in the United States from 1909 to 1923, and are now destined to two brothers and sons living in New York City. The present Greek passports valid for travel to Europe and Japan, issued on January 14, 1930, bearing French visa dated January 15, 1930, at Athens, bearing visa for the United Kingdom and Canada, dated January 15, 1930, but they do not bear a United States Consular immigration visa.

Excluded as quota immigrants not in possession of immigration visaes.

Attorney Harold Van Riper, 1 Broadway, New York City, interested.

Both aliens first arrived in the United States in 1909 and resided in this country until August 23, 1923, with the exception of one year's visit to Greece in 1913. Based upon their prior residence in this country, the aliens claim admission as non quota immigrants under Section 4 (*b*) of the Act of 1924, as aliens previously lawfully admitted to the United States, returning from a temporary visit abroad.

The statement is candidly made that they were refused visaes by the American Consul abroad, and that, pursuant to instructions received from the brothers and sons in this country, apparently on the advice of an attorney, they obtained passports valid for Europe

and Japan, as in transit to Japan, and procured Canadian in transit visaes, allowing them to pass through Canada on their way to Japan. It is also frankly admitted that they had no intention of proceeding to Japan, but that their purpose in going to Canada was to enable them to apply for admission to the United States and that, although they had no intention of proceeding to Japan, they falsely told the Canadian Immigrant inspector that it was their purpose to do so.

As proof of their status of returning residents the aliens testified that when they left the United States it was their intention to return within a period of six months, but because of the death of the father and husband (who had never been in the United States) in February, 1924, resulting in the inheritance of some real property which had to be sold, their stay was necessarily prolonged for a longer period than expected. It is shown by the record that prior to the death of the father inquiry was made by letter of the American Consul for extension of their stay abroad, which received appropriate response, that if the extension was requested because of illness, a doctor's certificate would be required; or, if made because of personal business, a full report of the circumstances which required a stay would have to be presented to the consulate.

It is further shown by the consular records that no attempt was made by the aliens to apply to the American Consul for visaes to return until March of the year 1929. No disposition has as yet been made of the real property left by the father and husband.

With the recital of these facts it will be seen that the two issues which the case presents are, whether the aliens have established their non quota status as immigrants previously lawfully admitted, returning from a *temporary* visit abroad, and whether, if they

have, they may be admitted notwithstanding the fact that they are not in possession of non quota immigration visaes.

By the enactment of the Immigration Law of 1924, Congress has directed that no immigrant shall be permitted to enter the United States unless he has an unexpired immigration visa. However, this requirement, in so far as it affects immigrants returning from a *temporary* visit abroad, may be dispensed with in accordance and under conditions prescribed by regulations. These regulations are:

> "An alien claiming to be a non quota immigrant on the ground that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad shall not be admitted as such unless at time of arrival he shall establish that he has been previously lawfully admitted to the United States and is returning from a temporary visit abroad, and presents an unexpired valid immigration visa duly issued by an American consular officer designating the holder as such: Provided, That the presentation of an unexpired valid permit to reenter, duly issued to the holder thereof pursuant to the provisions of section 10 of the immigration act of 1924, shall be deemed to show *prima facie* that such holder is returning from a temporary visit abroad, and shall be accepted also in lieu of immigration visa: And *further provided*, That any alien who establishes that he has been previously lawfully admitted to the United States and is returning from a temporary visit of not more than six months to Canada, Newfoundland, St. Pierre, Miquelon, Bermuda, Mexico, Cuba, and other islands included in the Bahama and

> Greater Antilles groups shall be permitted to enter the United States without a passport, an immigration visa, or permit to reenter." (Rule 3, subdivision *i*, par. 2.)

Unless therefore the aliens can bring themselves within the conditions which have been prescribed by the regulations for dispensing with an immigration visa, their admission is prohibited, not by regulations, but by the statute itself because they have no immigration visa. The condition now imposed by the regulations for dispensing with an immigration visa in such case as this is the possession of an unexpired permit to return. (See U. S. *ex rel* Timpano *vs.* Day, 21 Fed. (2) 852, D. C., S. D. of New York; Cf. Patti *vs.* Curran, 22 Fed. (2) 314, Johnson *vs.* Keating, 15 Fed. (2) 50, and Serpico *vs.* Trudell, decided by the U. S. District Court for the District of Vermont on November 8, 1928, relating to the same question prior to the amendment of the rule quoted.) The aliens have no immigration visaes nor permits and are therefore prohibited from entry.

It is also found that the aliens are not non quota immigrants as defined by the Act of 1924. Retention of domicile with its intention to return is insufficient to establish such status. The requirement is that the aliens must be returning from a *temporary visit abroad.* To hold that a seven years' absence in the country of nativity of the aliens is a temporary absence is to give to the phrase the meaning which it does not possess and which the United States Circuit Court for the Second Circuit has very definitely ruled must be defined as a short absence, its termination limited and fixed by some event. To illustrate, in the case of U. S. *ex rel.* Lesto *vs.* Day, 21 Fed. (2) 307, dealing with a family applying for admission as returning residents, the father being in possession of a

reentry permit, and the wife and children in possession of non quota immigration visaes, after an absence in the country of their nativity of five years, Judge Swan speaking for the Court said:

> "The wife and daughter had been away almost five years. The husband had been away more than two years before he came back as a temporary visitor, and more than four years before he applied for permanent readmission. During all this period he had no business nor place of habitation in this country. The word 'temporary' in the phrase 'returning from a temporary visit abroad' means more than the mere intention of domicile, that is, an intention to keep the United States as a home to which one will ultimately return. This follows from Section 10 of the Immigration Act of 1924, prescribing the issuance of permits for temporary absence. The applicant must state the length of his intended absence and the reasons therefor. The permit shall not be valid for more than one year, though there is a provision for extension from time to time for a period of six months for good cause shown. While at the present time there is no immigration rule defining a temporary visit abroad, the suggested construction is corroborated by the practice of the Department under former Acts in adopting a rule limiting a temporary visit to an absence of six months' duration. Such a rule was sustained as reasonable. See United States *ex rel.* Randazzo *vs.* Tod, 297 Fed. 214 (C. C. A. 2); United States *ex rel.* Devenuto *vs.* Curran, 299 Fed. 206 (C. C. A. 2). We cannot agree, therefore, with the opinion of the learned judge from whose order this appeal is taken, that retention

> of domicile is alone sufficient to establish that the relators are non-quota immigrants. Without attempting to complete definition of 'a temporary visit,' we may say that we think the intention of the departing immigrant must be to return within a period relatively short, fixed by some early event."

Again, in the case of Soas, U. S. *ex rel.* Thomas *vs.* Day, 29 Fed. (2) 485, a case which came before the United States Circuit Court of Appeals for the 2nd Circuit, the same question was involved. The aliens in that case, a man and his wife, originally came to the United States in 1924 to join their children. After a short stay in this country they went back to their home in Jamaica where they were real property owners. They returned to the United States to their daughter's wedding in June, 1926, on a temporary visit, as non immigrants, but went back to Jamaica to sell their real estate and with the intention of returning to the United States for the purpose of taking up their permanent residence in this country with their children. While they bought bedroom furniture and used it for their own purposes, they left it with the daughter when they returned to Jamaica. They did not succeed in selling their real property in Jamaica, and returned to the United States in October, 1928, and claimed admission at that time as non quota immigrants on the basis that they were previously lawfully admitted, and were returning from a temporary visit abroad. Judge Manton, who wrote the opinion affirming the dismissal of the writ sued out in behalf of the aliens, said:

> "With the burden resting on the appellants by virtue of Sec. 23 of the Immigration Act of 1924, they have failed to establish that they are entitled to admission as returning from a tem-

porary visit abroad. They were absent, since 1924, one year and three months before they came in June, 1925, and again one year and five months after leaving in 1927, and before they arrived on October 11, 1928. This was beyond the six months' period of absence referred to by the departmental rule: U. S. *ex rel.* DeVenuto *vs.* Curran, 299 Fed. 206; Mackusick *ex rel.* Pattavina *vs.* Johnson, 3 Fed. (2) 398; U. S. *ex rel.* Lesto *vs.* Day, 21 Fed. (2) 307. Under these facts, the appellants have not established a domicile within the United States for they had no true fixed and permanent home or principal establishment to which they had an intention of returning whenever absent. No person is without a domicile and he can have but one at a time. U. S. *ex rel.* DeVenuto *vs.* Curran, *supra.* The record justified the Board of Inquiry and sustains the District Court in its findings against the appellants."

On the facts recited, the section of law involved, and the authority cited, there must be an affirmance of the order of exclusion on the ground that the aliens are not non quota immigrants under Section 4 (*b*) of the Act of 1924, in that they are not returning to the United States from a *temporary* absence abroad.

It is recommended that the excluding decision of the Board be affirmed.

Chairman, Secy. & Comr.,
Genls. Board of Review.

JS:LLB.

So ordered:

———,
Assistant to the Secretary.

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